BRB No. 99-0257

JOSEPH W. LASSITER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: Nov. 19, 1999
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna, Klein & Camden, L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (97-LHC-1327) of Administrative Law Judge Fletcher E. Campbell, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant alleges he sustained an injury to his back during the course of his employment with employer while installing "bounder bars" on June 8, 1993.[1] Claimant, however, did not seek medical help at employer's clinic until June 28, 1993. EX 2. Claimant underwent back surgery for a herniated disc on August 2, 1993, CX 6, and currently suffers from debilitating reflex sympathetic dystrophy as a result of that surgery. Employer voluntarily paid claimant temporary total disability compensation from July 12, 1993, until February 9, 1997. 33 U.S.C. §908(b).

In his decision, the administrative law judge found that although claimant suffered a harm, he failed to establish his *prima facie* case by failing to prove he suffered a work-related injury. He then analyzed the evidence as if the Section 20(a), 33 U.S.C. §920(a), presumption had been invoked and determined that employer had established rebuttal of the presumption. Upon weighing the evidence as a whole, the administrative law judge found that causation had not been established. Accordingly, the administrative law judge denied claimant's request for compensation benefits.

On appeal, claimant contends that the administrative law judge erred in finding that he failed to establish his *prima facie* case for invocation of the Section 20(a) presumption or that, alternatively, employer rebutted the presumption. Employer responds, urging affirmance of the administrative law judge's decision.

Claimant initially contends that the administrative law judge erred in failing to invoke the Section 20(a) presumption. Specifically, claimant argues that he established the existence of working conditions which could have caused his back condition. It is well-established that claimant bears the burden of proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused the harm, in order to establish a *prima facie* case. *See U. S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP,* 455 U.S. 608, 14 BRBS 631 (1982); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990); *Bartelle v. McLean Trucking Co.*, 14 BRBS 166 (1981), *aff'd,* 687 F.2d 34, 15 BRBS 1 (CRT)(4th Cir. 1982). It is claimant's burden to establish each element of his *prima facie*

[1]The date of injury was stipulated to by the parties, Decision and Order at 4 n.2; employer's clinic records reflect that the injury may have developed over a period of time after that date.

case by affirmative proof. *See Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994). In this regard, claimant is not required to introduce affirmative medical evidence proving that the working conditions in fact caused his injury; rather, claimant must show only the existence of working conditions which could have caused his harm. *See generally U. S. Industries,* 455 U.S. at 608, 14 BRBS at 631.

In the instant case, it is uncontroverted that claimant sustained an injury to his back. The administrative law judge stated that claimant sustained "some harm" *(see* Decision and Order at 11), but declined to invoke the Section 20(a) presumption, stating that claimant's "failure to prove that he suffered a work-related injury prevents invocation of the presumption." *Id.* In order to establish his *prima facie* case for invocation of the statutory presumption, claimant is not required to prove that his working conditions in fact caused the harm alleged; rather, under Section 20(a), it is presumed in the absence of substantial evidence to the contrary that the harm demonstrated is related to the proven work events. *See Sinclair v. United Food and Commercial Workers*, 23 BRBS 148 (1989); *Kelaita v. Triple A Machine Shop,* 13 BRBS 326 (1981). In the instant case, claimant testified that his work duties on June 8, 1993, included climbing up and down ladders while carrying bounder bars which were ten to twelve feet in length, three to four inches in width, and when bundled weighed between 35 to 40 pounds. In addressing invocation, the administrative law judge did not discuss claimant's work but focused on his delay in reporting his alleged work-related injury. Thus, the administrative law judge did not specifically determine whether the evidence was sufficient to establish the existence of working conditions which could have caused claimant's back condition. Therefore, the administrative law judge's conclusion that claimant did not invoke Section 20(a) cannot be affirmed.

Despite the administrative law judge's statement that the statutory presumption was not invoked, he thereafter analyzed the evidence "on the basis of an assumption that Claimant has proven a work-related injury," in order to aid the parties, noting that there was some medical evidence that the alleged work injury caused claimant's back problems. Decision and Order at 11. As the administrative law judge thus addressed rebuttal, his error in applying an incorrect standard in discussing invocation would be harmless if he properly found Section 20(a) rebutted. As the administrative law judge did not fully address the evidence in this regard, however, we are unable to affirm his decision on this basis.

Where the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption by producing substantial evidence that claimant's condition was neither caused nor aggravated by his employment. *See American Grain Trimmers, Inc. v. OWCP,* 181 F.3d 810, 33 BRBS 71 (CRT)(6th Cir. 1999)(*en banc); Swinton v. J. Frank Kelley, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If the administrative law judge finds that the Section 20(a) presumption is rebutted, it drops

from the case. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997). The administrative law judge then must weigh all of the evidence and resolve the issue of causation on the record as a whole with claimant bearing the burden of persuasion. *See Greenwich Collieries,* 512 U.S. at 267, 28 BRBS at 43 (CRT).

In this case, the administrative law judge determined that employer established rebuttal of the Section 20(a) presumption based upon the opinion of Dr. Thrasher, a psychiatrist, who opined that claimant's "back problems and chronic pain problems since 1993 are related to his March, 1993 automobile accident and not to any alleged on the job injury." EX 5 at 2. As claimant avers on appeal, however, the administrative law judge neglected to include Dr. Thrasher's preface to this statement that "[a]fter review of the additional medical information, I am in agreement with Dr. Schneider and Dr. McAdams...." *Id.* Neither Dr. Schneider nor Dr. McAdam stated unequivocally that claimant's current condition was unrelated to his employment with employer. Rather, Dr. McAdam, who performed claimant's surgery, vacillated between whether the automobile accident or his employment caused claimant's condition, *compare* EX 5 with CX 6, ultimately concluding on deposition that he could not relate claimant's problem to either event with a reasonable degree of medical certainty.[2] Dr. Schneider treated claimant after his automobile accident, referring him to Dr. McAdam in the June 1993. Her August 29, 1994, report documents his complaints of back and neck pain after the automobile accident. EX 1. She concluded therein that she was "inclined to find the accident at fault for the actual herniation of the

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[2]In his deposition, Dr. McAdam attributed this inability to claimant's failure to give him the relevant information regarding the automobile accident during his treatment. Claimant provided a history relating his back problems to the shipyard, and he thus initially related his surgery to his employment. Thereafter, when provided additional records by employer's attorney, he stated in a May 30, 1997, letter that the disk herniation was more likely related to the automobile accident. EX 3. Dr. Thrasher's report was written after this letter. Dr. McAdam reiterated this conclusion in a November 18, 1997, letter. *Id.* At his 1998 deposition, however, after again reviewing the records, he could not give an opinion based on a reasonable degree of medical certainty.

disc." *Id.* However, on deposition, when asked whether the fact that claimant was back working during this period would contribute to the worsening of his symptoms which preceded his referral to Dr. McAdam, she replied "certainly," and explained that by ignoring lifting restrictions and doing a lot of bending, patients like claimant decrease their chance for the natural healing which can occur with even herniated discs. EX 12 at 14-15. Dr. Schneider stated that by returning to work claimant "almost certainly sealed the book" on the possibility of healing without surgical intervention. *Id.* at 15. Since Dr. Thrasher related his opinion to the conclusions of Drs. McAdam and Schneider, a fact which the administrative law judge did not discuss, we must vacate the administrative law judge's finding of rebuttal.

The case is remanded for the administrative law judge to reconsider invocation and rebuttal of Section 20(a). If Section 20(a) presumption is invoked, he must reconsider whether Dr. Thrasher's opinion rebuts the presumption, bearing in mind that it is employer's burden to produce substantial evidence that claimant's disabling condition is not related to his employment. *See Universal Maritime Corp.,* 126 F.3d at 256, 31 BRBS at 119 (CRT); *see also American Grain Trimmers,* 181 F.3d at 810, 33 BRBS at 71 (CRT)*; Gooden v. Director, OWCP,* 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); *Hensley v. Washington Metropolitan Area Transit Authority,* 655 F.2d 264, 13 BRBS 182 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 904 (1982). Employer's burden of production must also be considered in conjunction with the aggravation rule, since, if claimant's work for employer after the automobile accident aggravated, accelerated or combined with a prior condition, the entire resultant disability is compensable. *Hensley*, 655 F.2d at 264, 13 BRBS at 182; *Independent Stevedore Co. v. O'Leary,* 357 F.2d 812 (9th Cir. 1966). If the administrative law judge determines that the presumption has been rebutted, he must resolve the causation issue based on the record as a whole. *Universal Maritime Corp.,* 126 F.3d at 256, 31 BRBS at 119 (CRT). If causation is established, the administrative law judge must address the extent of disability and any remaining issues.

Accordingly, the administrative law judge's Decision and Order denying disability benefits is vacated, and the case is remanded for reconsideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge